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COMMONWEALTH OF VIRGINIA, *ex rel.*

**VIRGINIA LINEN SERVICE, INC.,
Complainant,**

v.

CASE NO. PUE990106

**VIRGINIA ELECTRIC AND POWER COMPANY,
Defendant.**

REPORT OF ALEXANDER F. SKIRPAN, JR., HEARING EXAMINER

December 14, 1999

Virginia Code § 56-234.1 requires utilities, upon request, to determine the lowest rate applicable for the requesting customer. This section entitles a customer to one such determination per year. In this case, Virginia Linen seeks retroactive application of Rate Schedule 10 to the date of implementation, which occurred between its annual requests to Virginia Power.

HISTORY OF THE CASE

On March 1, 1999, Virginia Linen Service, Inc. ("Virginia Linen") filed a Petition against Virginia Electric and Power Company ("Virginia Power") pursuant to Rule 5:6 of the Commission's Rules of Practice and Procedure.¹ In its Petition, Virginia Linen sought the benefits of Rate Schedule 10, which was implemented in August 1996. Virginia Linen claimed it was entitled to the benefits of Rate Schedule 10 by virtue of its request to Virginia Power under Virginia Code § 56-234.1 in February 1996. On May 19, 1999, the Commission entered a Preliminary Order in which it directed Virginia Power to file a response to Virginia Linen's Petition by June 9, 1999, and assigned the matter to a Hearing Examiner.

On June 9, 1999, Virginia Power filed its Answer, Motion to Dismiss, and Motion for More Definite Statement. In its Answer, Virginia Power maintained that when it made its rate determination on June 6, 1996, Virginia Linen did not qualify for Rate Schedule 10. Moreover, Rate Schedule 10 did not become effective until after Virginia Power made its determination. In its Motion to Dismiss, Virginia Power argued that its initial determination as of June 6, 1996, was correct and that Virginia Code § 56-234.1 does not impose an obligation on a utility to continuously monitor a customer's account in order to notify the customer of any subsequent rate changes.

A Hearing Examiner's Ruling, dated June 15, 1999, denied Virginia Power's motions, based on findings that (i) the pleadings raised questions of fact, and (ii) the Petition was of

¹ 5 VAC 5-10-320.

sufficient specificity to permit Virginia Power a fair and adequate opportunity to respond. Consequently, the Examiner's Ruling established a hearing date and procedural schedule for the case.

On September 28, 1999, a hearing was convened for receiving evidence and oral argument on Virginia Linen's Petition. Representing Virginia Linen at this hearing were John R. Fletcher, Esquire, and Michael B. Hamar, Esquire. John D. Sharer, Esquire, appeared on behalf of Virginia Power. C. Meade Browder, Esquire, appeared on behalf of the Staff. Filed with this Report is the transcript from the hearing.

SUMMARY OF THE RECORD

Virginia Linen is a linen and uniform rental service and commercial laundry located in Petersburg, Virginia.² Annual purchases of electricity by Virginia Linen from Virginia Power historically exceed \$100,000.³ Over the past twenty years, Virginia Linen has made it a general practice annually to provide Virginia Power with a written request, asking for a determination of the lowest electric rate available to Virginia Linen as provided by Va. Code § 56-234.1.⁴

By letter dated February 7, 1996, Virginia Linen made its annual request to Virginia Power.⁵ At that time, Virginia Linen purchased electricity from Virginia Power under Rate Schedule 6, and had a peak demand of 412 kW.⁶ Virginia Power responded by letter dated June 6, 1996, stating that Virginia Linen was "being billed on the most economical electric rate available"⁷

Sometime between June 4 and June 14, 1996, Virginia Linen established a new peak demand of 595 kW.⁸

² Exhibit DLS-3, at 1.

³ Exhibit Virginia Linen-1, at 1.

⁴ *Id.* at 1; Exhibit DLS-3, at Attachments.

⁵ Exhibit DLS-3, at Attachment 27.

⁶ Exhibit DTL-4, at 12, Schedule DTL-2.

⁷ Exhibit DLS-3, at Attachment 28.

⁸ Exhibit DLT-4, at 5-6.

In a letter dated June 24, 1996, Virginia Power filed a tariff revision with the Commission, seeking implementation of Rate Schedule 10 for service rendered after July 24, 1996.⁹ Under Virginia Power's proposal, Rate Schedule 10 would become a permanent rate, available to customers with demand of at least 500 kW.¹⁰ At the time of Virginia Power's filing, Rate Schedule 10 was a rate experiment open to only 200 customers with demand of at least 500 kW.¹¹ The Commission administratively accepted Rate Schedule 10, by letter dated August 8, 1996.¹²

By letter dated February 10, 1997, Virginia Linen again asked Virginia Power to determine if it was being served under the most economical rate schedule.¹³ Virginia Linen followed up its request with a letter dated April 16, 1997, to Mr. John B. Adams, Jr., chairman of the board-Virginia Power. In its letter Virginia Linen complained of the significant increase in electricity costs it had experienced in recent months and of Virginia Power's lack of response to its requested rate schedule determination.¹⁴ In the course of investigating Virginia Linen's complaint, Virginia Power attributed the increase in electric costs to the high peak demand experienced by Virginia Linen in June 1996.¹⁵ Virginia Power also determined that Virginia Linen could reduce its costs by using Rate Schedule 10.¹⁶ In this regard, Virginia Power agreed to apply Rate Schedule 10 retroactively to February 1997.¹⁷

Virginia Linen's initial response was that the demand "spike" in June 1996 was due to lightning or the malfunction of Virginia Power's equipment.¹⁸ Moreover, Virginia Linen maintained that it was entitled to a refund to August 1996, when Rate Schedule 10 first became available.¹⁹ This last issue is the subject of Virginia Linen's Petition and this case.

On July 20, 1999, in support of its Petition, Virginia Linen filed the direct testimony of Donald L. Struminger, president of Virginia Linen.²⁰ In his testimony, Mr. Struminger documented Virginia Linen's practice of annually requesting rate determinations from Virginia Power. Mr. Struminger also provided correspondence between Virginia Linen and Virginia Power concerning this dispute. Finally, Mr. Struminger argued that Virginia Linen should be afforded the benefits of Rate Schedule 10 from its implementation.²¹

⁹ *Id.* at Schedule DTL-22.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at Schedule DTL-23.

¹³ *Id.*

¹⁴ *Id.* at Schedule DTL-4.

¹⁵ *Id.* at 6.

¹⁶ *Id.* at 7-8, Schedule DTL-7.

¹⁷ *Id.* at 9, Schedule DTL-10.

¹⁸ *Id.* at 8, Schedule DTL-8.

¹⁹ *Id.* at 11, Schedules DTL-12 and 13; Exhibit DLS-3, at Attachment 31.

²⁰ Exhibit DLS-3.

²¹ *Id.* at 10.

On August 24, 1999, in response, Virginia Power filed the testimony of David T. Leaf, senior commercial engineer in Virginia Power's Energy Efficiency Department.²² In his testimony, Mr. Leaf recounted his dealings with Virginia Linen regarding its eligibility for Rate Schedule 10. In addition, Mr. Leaf supported Virginia Power's response to Virginia Linen's 1996 rate schedule determination and Virginia Power's refusal to apply Rate Schedule 10 retroactively to August 1996.²³ In this regard, Mr. Leaf provided six reasons Virginia Linen is not entitled application of to Rate Schedule 10 retroactively to August 1996. These reasons include:

1. Virginia Linen's February 7, 1996, request was for the lowest rate applicable for electric service to Virginia Linen in accordance with rate schedules on file with the Commission.
2. Virginia Power's response, dated June 6, 1996, accurately informed Virginia Linen that Rate Schedule 6 was the lowest rate applicable as of that date.
3. On June 6, 1996, Rate Schedule 10 was an experimental rate, limited to 200 customers.
4. Rate Schedule 10 was available only for customers with demand equal to or greater than 500 kW. As of June 6, 1996, Virginia Linen failed to meet that eligibility requirement.
5. Virginia Power's request and the Commission's administrative acceptance of revised Rate Schedule 10 occurred after June 6, 1996, when Virginia Power made its annual determination for Virginia Linen.
6. Virginia Power billed Virginia Linen retroactively for usage beginning in February 1997, based on Virginia Linen's request for annual determination for 1997.²⁴

On September 13, 1999, Virginia Linen filed the rebuttal testimony of Donald L. Struminger.²⁵ In his rebuttal testimony, Mr. Struminger explained that Virginia Power failed to inform Virginia Linen of the 500 kW requirement for Rate Schedule 10.²⁶ Nonetheless, Mr. Struminger continued to assert that Virginia Linen was entitled to retroactive application of Rate Schedule 10 from its effective date. Specifically, Mr. Struminger testified:

Virginia Linen believes it should have been afforded the Schedule 10 rate from its implementation based upon (i) Virginia Linen's February, 1996 written request to VEPCO and VEPCO's knowledge (as evidenced by VEPCO's own direct testimony in this matter) of Virginia Linen's ongoing efforts to minimize its energy

²² Exhibit DTL-4.

²³ *Id.* at 12-13.

²⁴ *Id.*

²⁵ Exhibit DLS-5.

²⁶ *Id.* at 2-3.

costs, (ii) the provisions of Section 56-234.1 . . . , and (iii) Virginia Power's knowledge of the impending rate change at the time of its June 6, 1996 response to Virginia Linen.²⁷

At the September 28 hearing, by stipulation, all testimony was entered into the record without cross-examination.²⁸ Thus, the focus of the hearing was on the presentation of oral argument concerning the requirements of Virginia Code § 56-234.1.

DISCUSSION

The facts in this case are not in dispute.²⁹ Virginia Linen does not dispute Virginia Power's June 6, 1996, determination that Schedule 6 was the most economical rate schedule for Virginia Linen at that time.³⁰ However, Virginia Linen argues that by making annual requests under § 56-234.1, it qualifies for the application of more economical rates retroactively to the date it became eligible.³¹ Virginia Power counters that § 56-234.1 entitles Virginia Linen to only one rate determination per year.³²

The relevant portion of Virginia Code § 56-234.1 is as follows:

It shall be the duty of every public utility, upon written request by the customer, to determine the lowest rate applicable, provided that such public utility shall not be required to make such a determination for any single customer more frequently than annually. If the rate charged thereafter is not such lowest rate applicable, such public utility shall be liable to the customer for the amount of the difference between the amount paid by the customer and the amount that would have been paid if the customer had been charged the lowest rate applicable from and after the customer's request;

Virginia Linen asserts that its position is consistent with the statutory language that limits the duty of Virginia Power make such a determination "not . . . more frequently than annually."³³ As Virginia Linen argued:

We are not requesting a determination more than annually. We are requesting that the determination made on an annual basis, if it fits, be made retroactive to the date of eligibility.³⁴

²⁷ *Id.* at 3.

²⁸ Tr. at 3-7.

²⁹ Fletcher, Tr. at 8.

³⁰ *Id.* at 9.

³¹ *Id.* at 12.

³² Sharer, Tr. at 27-29.

³³ Fletcher, Tr. at 16-17.

Further, Virginia Linen contends that nothing in the statute prohibits retroactive applicability.³⁵ Virginia Linen points out that Virginia Power has agreed to apply Rate Schedule 10 retroactively from the date of determination to the date Virginia Linen last made a written request. As a matter of fairness, Virginia Linen seeks retroactive treatment to the date it became eligible for Rate Schedule 10.³⁶

Virginia Power views its duties under § 56-234.1 differently. As counsel for Virginia Power reasons, once it accurately determined the lowest rate applicable to Virginia Linen on June 6, 1996, Virginia Power's obligations under § 56-234.1 ended, until the date of Virginia Linen's next annual request.³⁷ Moreover, Virginia Power avers that statutory use of "determination" implies "ending" or "final resolution."³⁸ Thus, Virginia Linen's fairness argument fails to follow the meaning of the controlling statutory language.³⁹

In reply, Virginia Linen maintains that the meaning of § 56-234.1 comes down to construing the meaning of "[i]f the rate charged thereafter" in the second sentence.⁴⁰ In this case, if the determination that Rate Schedule 10 was the most economical rate relates to or is "thereafter" February 1996, then Virginia Linen submits it is entitled to a refund retroactive to August 1996.⁴¹ On the other hand, if the determination concerning Rate Schedule 10 is held to be "thereafter" February 1997, then Virginia Linen concedes that the Commission should find in favor of Virginia Power.⁴²

The last portion of the second sentence of § 56-234.1 sets a utility's liability for failing to charge a customer the lowest rate applicable. This liability is defined as the difference between (i) "the amount paid by the customer," and (ii) "the amount that would have been paid if the customer had been charged the lowest rate applicable." More importantly for this case, § 56-234.1 sets the period for retroactively applying the lower rate to "from and after the customer's request." Consequently, when Virginia Power determined in May 1997 that Rate Schedule 10 was the most economical rate for Virginia Linen, § 56-234.1 required granting a refund retroactive to Virginia Linen's request, or February 1997. Section 56-234.1 does not require refunds to earlier periods.

Another way to read the statute and arrive at the same result is that a utility is required to make an annual determination of the lowest rate applicable for a customer and apply *that* rate thereafter. Thus, in this case, when Virginia Linen requested its determination in February 1996,

³⁴ *Id.* at 16.

³⁵ *Id.* at 17.

³⁶ *Id.*

³⁷ Sharer, at 28-29.

³⁸ *Id.* at 31-32.

³⁹ *Id.*

⁴⁰ Fletcher, Tr. at 41.

⁴¹ *Id.*

⁴² *Id.*

and Virginia Power correctly determined that Rate Schedule 6 was the most economical rate for Virginia Linen, § 56-234.1 required Virginia Power to apply “such lowest rate applicable” (*i.e.*, Rate Schedule 6) to all usage subsequent to Virginia Linen’s February 1996 request. Likewise, in 1997 when Virginia Power determined the most economical rate for Virginia Linen to be Rate Schedule 10, that became the rate that the statute required for usage after Virginia Linen’s February 1997 request.

Turning to Virginia Linen’s fairness argument, in essence, Virginia Linen contends that it has done “everything that it can” to assure itself that it is being served under the most economical rate available.⁴³ I disagree. Though the record is unclear as to the level of notice and publication that accompanied Virginia Power’s adoption of Rate Schedule 10 in 1996, such rate filings are a matter of public record. Moreover, Virginia Power’s tariffs are open to public inspection. Nothing prevented Virginia Linen from studying the benefits of Rate Schedule 10 or asking Virginia Power about the benefits of Rate Schedule 10. Indeed, Virginia Linen learned of Rate Schedule 10 through inquiries related to Virginia Linen’s increased demand.⁴⁴ Consequently, Virginia Linen had other options to assure itself that it received the most economical rate available apart from the annual rate review provided by § 56-234.1. Accordingly, I find that the Commission should deny Virginia Linen’s Petition.

FINDINGS AND RECOMMENDATIONS

In conclusion, based on the evidence and arguments presented in this case, I find that:

- (1) On February 6, 1996, pursuant to § 56-234.1, Virginia Linen provided Virginia Power with a written request for a determination that it was being served under the most economical electric rate schedule;
- (2) On June 6, 1996, Virginia Power correctly determined that Rate Schedule 6 was the most economical electric rate schedule for Virginia Linen;
- (3) On June 14, 1996, Virginia Linen established a peak demand of 595 kW;
- (4) On June 24, 1996, Virginia Power filed revised Rate Schedule 10 with the Commission, replacing Experimental Rate Schedule 10;
- (5) On August 8, 1996, the Commission administratively accepted Rate Schedule 10, making it available for service rendered after July 24, 1996;
- (6) On February 10, 1997, pursuant to § 56-234.1, Virginia Linen provided Virginia Power with a written request for a determination that it was being served under the most economical electric rate schedule;

⁴³ *Id.* at 17, 41.

⁴⁴ Exhibit DTL-4, at 4-9.

(7) On April 29, 1997, Virginia Power determined that use of Rate Schedule 10 could produce savings for Virginia Linen;

(8) On May 22, 1997, Virginia Power offered to apply Rate Schedule 10 for Virginia Linen retroactive to February 10, 1997; and

(9) Va. Code § 56-234.1 does not require retroactive application of Rate Schedule 10 for Virginia Linen to any date before February 10, 1997.

I therefore **RECOMMEND** that the Commission enter an order that:

(1) **ADOPTS** the findings of this Report;

(2) **DENIES** Virginia Linen's Petition; and

(3) **DISMISSES** this case, with prejudice, from the Commission's docket of active cases and passes the papers herein to the file for ended causes.

COMMENTS

The parties are advised that pursuant to Rule 5:16(e) of the Commission's Rules of Practice and Procedure,⁴⁵ any comments to this Report must be filed with the Clerk of the Commission in writing, in an original and fifteen copies, within fifteen (15) days from the date hereof. The mailing address to which any such filing must be sent is Document Control Center, P. O. Box 2118, Richmond, Virginia 23218. Any party filing such comments shall attach a certificate to the foot of such document that copies have been mailed or delivered to all other counsel of record and to any party not represented by counsel.

Respectfully submitted,

Alexander F. Skirpan, Jr.
Hearing Examiner

⁴⁵ 5 VAC 5-10-420 F.